

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
MICHAEL AND IRENE TONG	:	ORDER
for Redetermination of a Deficiency or for	:	DTA Nos. 807425
Refund of New York State and New York City	:	808509
Personal Income Tax under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Years 1986 and 1987.	:	

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A Default Order having been mailed to petitioners and their representative on April 11, 1991; and

Petitioners having made a request by written application that the default determination be vacated; and

The following facts having been established by the pleadings and other information submitted:

1. On May 2, 1989 Notice of a Conciliation Conference was mailed to petitioners at their home located at 19 Parsells Court, Closter, New Jersey 07604, and to their representative, Stuart A. Ditsky, C.P.A., at his office located at 850 Third Avenue, 19th floor, New York, New York 10022, advising them that a conciliation conference was scheduled before Kathleen Beruard, Conciliation Conferee of the Bureau of Conciliation and Mediation Services ("BCMS"), at the offices of the Commissioner of Taxation and Finance on June 6, 1989 at 2:45 P.M. Neither notice was returned by the United States Postal Service;

2. On June 6, 1989 at 2:45 P.M. both the Division of Taxation's representative and the conferee, Kathleen Beruard, were present and prepared to commence a discussion of petitioners' claim. However, neither petitioners nor their representative appeared. As a result, a Conciliation Default Order was mailed to petitioners and their representative at the same addresses on June 30, 1989 notifying them that they had 30 days to submit a reasonable excuse

for their non-appearance or, in the alternative, 90 days from the date of the order to file a petition. These letters were not returned by the Postal Service;

3. Petitioners sent a petition to the Division of Tax Appeals requesting a small claims hearing. The petition was received on September 21, 1989 but was rejected due to insufficient information. An amended petition was received by the Division of Tax Appeals on October 10, 1989, some 12 days after the deadline. The Division of Tax Appeals acknowledged receipt of said petition and deemed it to be in proper form in letters dated October 13, 1989, to both petitioners and their representative at the same addresses as used by BCMS. These letters were not returned by the Postal Service;

4. On April 9, 1990, a Notice of Small Claims Hearing, signed by Presiding Officer Allen Caplowaith, was sent to petitioners and their representative at the same addresses advising them that the Division of Tax Appeals had scheduled a hearing for May 16, 1990 at 10:00 A.M. These letters were not returned by the Postal Service;

5. On May 4, 1990 Mr. Ditsky telephoned the Division and requested an adjournment of the hearing. The excuse offered was that Mr. Ditsky was in the process of moving to a new office and had reserved the elevator for the night of May 15, 1991 and would, therefore, not be able to locate the necessary files in time for the scheduled hearing. The adjournment was granted by Robert Mulligan, who substituted for Mr. Caplowaith due to his illness, provided that a written request would be submitted shortly;

6. A written request for such postponement was received by the Division of Tax Appeals on May 9, 1990 and reiterated what had been discussed over the telephone;

7. On October 23, 1990, a Notice of Small Claims Hearing, signed by Presiding Officer Allen Caplowaith, was sent to petitioners at the Closter, New Jersey address and to petitioners' representative at his new address, 733 Third Avenue, 19th floor, New York, New York 10017, advising them that the hearing had been rescheduled for November 29, 1990 at 1:15 P.M. These notices also were not returned by the Postal Service;

8. On November 29, 1990 Mr. Ditsky's partner, Mr. Zoref, telephoned the Division of

Tax Appeals and requested a second adjournment due to the fact that Mr. Ditsky was ill and had been taken to the hospital for overnight testing. This second request for an adjournment was also granted by Robert Mulligan;

9. On January 21, 1991 a Notice of Small Claims Hearing, signed by Presiding Officer James Hoefer, was mailed to petitioners and their representative at the same addresses and advised them that the hearing had been rescheduled for February 28, 1991 at 9:15 A.M. These notices were also not returned by the Postal Service;

10. On February 27, 1991 Mr. Ditsky telephoned Mr. Hoefer and requested an adjournment due to the fact that a close friend and business associate of his had been killed in an automobile accident and the funeral had been scheduled for the same date as the hearing. Mr. Hoefer granted the adjournment on the sole condition that a detailed written request be submitted. Such letter was never received;

11. On March 4, 1991 a Notice of Small Claims Hearing, signed by James Hoefer, was mailed to petitioners and their representative at the same addresses and informed them that the hearing had been rescheduled for March 21, 1991 at 1:15 P.M. These notices were also not returned by the Postal Service;

12. On March 21, 1991 at 1:15 P.M., Presiding Officer Hoefer called the instant matter for hearing. Neither petitioners nor their representative appeared at the scheduled hearing nor had they previously contacted either the Division of Tax Appeals or the Division of Taxation to request an adjournment or postponement. The Division of Taxation's representative appeared and made a motion for a default order to be issued against petitioners;

13. A default order, signed by James Hoefer, was issued and mailed by certified mail to petitioners and their representative at the same addresses on April 11, 1991. Again, these orders were not returned;

14. On April 29, 1991 the Supervising Administrative Law Judge received a letter from Mr. Ditsky containing an application to vacate the default determination. In his letter, Mr. Ditsky attempted to justify his absence at the March 21, 1991 hearing by saying that the hearing

date "could not be kept because [he] was unable to reschedule a dozen tax return appointments on such short notice." Mr. Ditsky also expressed his concern for the taxpayers and stated that it would be inequitable not to afford the taxpayers a new opportunity to present their claim. No excuse was offered for Mr. Ditsky's failure to telephone the Division of Tax Appeals or the presiding officer to notify them that he was not going to appear. The letterhead indicated Mr. Ditsky had an office at 733 Third Avenue, 19th floor, New York, New York 10017, the address to which the previous mailings had been sent;

15. On May 22, 1991 a letter from Michael C. Gitter, Associate Attorney, was received by the Division of Tax Appeals expressing opposition to the vacating of the default order on the grounds that petitioners had not complied with 20 NYCRR 3000.9(d)(3) since they did not demonstrate a valid excuse for not appearing or prove a meritorious case. Mr. Gitter also raised the point that another accountant from Mr. Ditsky's office could have appeared if Mr. Ditsky was unavailable;

16. The personal income tax assessment in this case was based solely on tax returns filed by petitioners for the year 1986 in which the taxpayers failed to substantiate expenses allegedly incurred while away from home for business, rather than personal, reasons. On July 15, 1987 the Division of Taxation sent a letter to petitioners requesting additional information. When petitioners failed to respond, the allocation was disallowed. On November 5, 1987 petitioners' representative replied to the Division's request for information, but the information submitted was still insufficient to change the assessment figures. A Notice of Deficiency was issued February 29, 1988 asserting additional tax due of \$3947.00 plus interest for a total of \$4159.47; and

It appearing to the Chief Administrative Law Judge from a review of such information as was submitted that neither a reasonable excuse nor a meritorious case has been shown for the following reasons:

(1) Petitioners were granted three adjournments as a result of the various excuses offered: Mr. Ditsky's moving offices, Mr. Ditsky's illness, and the unfortunate death of a close

friend of Mr. Ditsky's. The latter adjournment was granted upon the condition that a written request be submitted, but such request was never received;

(2) Neither petitioners nor their representative appeared at the hearing scheduled for March 21, 1991. Notice of such appointment was mailed to both petitioners and their representative on March 4, 1991, thus giving petitioners two weeks to change their plans so that they would be able to attend the hearing or to notify the Division of Tax Appeals of a personal conflict and request a postponement;

(3) The only excuse offered for petitioners' default was received by the Division of Tax Appeals over one month after such default and subsequent to petitioners' receipt of the default determination. Mr. Ditsky claimed that he had been unable to reschedule a dozen tax return appointments on such short notice. However, he offered no explanation for not contacting the Division of Tax Appeals in advance of the hearing date to attempt to schedule a mutually convenient appointment time. The excuse offered was, therefore, unreasonable;

(4) Assuming, arguendo, that petitioners in fact had submitted a reasonable excuse for their default, they have also failed to show a meritorious case. The tax assessed was based on filed returns signed by petitioners. When the Division requested additional information petitioners failed to respond, resulting in the disallowance of petitioners' claim. When petitioners finally answered the Division's request for information, the information submitted was insufficient to change the assessment. In both the petition and application to vacate the default determination, petitioners' representative made general reference to diaries and itineraries which petitioners allegedly possess as proof of the claimed business expenses. However, no mention was made as to the substance of these documents or the reason why they were not submitted to the Division when additional information was initially requested; therefore

It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued April 11, 1991 is sustained.

DATED: Troy, New York

CHIEF ADMINISTRATIVE LAW JUDGE